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ALEXANDER L. STEVAS,
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No. 83-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EAST CHICAGO REHABILITATION CENTER, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

RESPONSE TO BRIEF IN OPPOSITION

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Respondent's brief in opposition[1] misconstrues the issues presented for review by this petition. In asserting that the petition should not be granted, Respondent incorrectly argues that the issues presented by the petition are "fact-bound". (Opp. 6). However, contrary to Respondent's assertions, the issues presented by this petition are legal questions, the resolution of which is essential to the proper administration of the National Labor Relations Act, 29 U. S. C. § 151, *et seq.* (hereinafter the "Act").

[1] Reference to Respondent's brief in opposition will be denoted as "Opp."; to Petition for Writ of Certiorari as "Pet."; and to Appendix as "a."

1. The Exclusivity Principle

Respondent's arguments, and the decision below, clearly ignore the express provisions of Section 9(a) of the Act (83a) and the principles set forth by this Court in *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U. S. 50 (1975).

First, Section 9(a) expressly provides that the union, having been selected by a majority of the employees (as it was herein), "shall be the *exclusive* representative of *all* the employees . . . for the purposes of collective bargaining . . ." (emphasis added). The *only* limitation to this broad mandate is the narrow exception contained in the *proviso* to Section 9(a), which permits individual or group presentation and adjustment of grievances "as long as the adjustment is not inconsistent with the terms of a collective bargaining agreement" and provided further "that the bargaining representative has been given opportunity to be present at such adjustment."[2] Nowhere in the statutory scheme is there support for the "exception" set forth in the decision below—that a group of union represented employees may independently take concerted action to enforce their demands unless they are "at odds with or attempting to by-pass their union" (10a) or, as argued by the Respondent—as long as they are not striking "against the union" or "to pressure the union." (Opp. 9). Manifestly, such an unwarranted "exception" must be rejected, and this Court should grant this petition to ensure that the express provisions of Section 9(a) are given their full import.

Second, the decision below, and the argument of Respondent herein, seriously erode and attempt to unduly restrict the principles established by this Court in *Emporium Capwell, supra.* In concluding that a group of unionized employees are free to ignore their elected union representative and take independent economic action, the Court below misconstrued

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[2] See Judge Coffey's dissent below (30a, fn. 1) for an analysis of the failure of the conduct herein to satisfy the *proviso* to Section 9(a).

the "exclusivity" principles established by this Court in *Emporium Capwell,* that where employees had selected a Section 9(a) representative, they were obligated to bargain *only* through that representative.[3] Contrary to the decision below no exception was made in *Emporium Capwell* for minority conduct which was not at "cross-purposes" with union conduct.[4] (Opp. at 8, fn. 3). Nor did *Emporium Capwell* hold that employees need have an express goal of undermining their exclusive collective bargaining representative before their conduct will become unprotected. Indeed, in this context employees' goals are immaterial; rather, it is the independent means they use to achieve that goal which will render their activity unprotected under *Emporium Capwell.* What Respondent and the Court below have attempted to do is carve out an unwarranted exception to this Court's decision in *Emporium Capwell,* for minority groups of employees who are not directly at odds with their union. (Opp at 9; 7a). However, such a result was not intended by the decision in *Emporium Capwell,* and threatens to undermine the whole efficacy of the exclusivity principle and

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[3] In *Emporium Capwell,* the Court cites with approval the following language from *NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175 (1967):

> "... the policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees ... Thus *only* the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the Union may even bargain away his right to strike during the contract term ..." (emphasis added), 388 U.S. at 180. *Emporium Capwell Co.* v. *Western Addition Community Org., supra* at 63-64.

[4] Indeed, in *Emporium Capwell,* this Court found employees' independent activity to be unprotected and their discharges justified, notwithstanding the fact that their independent action opposing racism was in support of the Union's position opposing racism. 420 U.S. at 69-70.

the majoritarian rule encompassed by that decision, as well as Section 9(a).

Lastly, even the Court below recognized that the statutory scheme could be interpreted to prohibit the "wildcat strike" conduct engaged in herein, but then it improperly deferred to the Board's erroneous interpretation of the relevant provisions.[5] Thus, the Court below properly asserted (but then failed to adopt) the correct analysis that:

> "If the Board were to hold that wildcat strikes are per se in derogation of the union's role as exclusive bargaining representative—pointing out, as it could, that any concerted activity is an implicit demand for company action and is therefore inherently inconsistent with the union's exclusive role—we would give its views respectful attention." (11a).[6]

It is submitted that the above-quoted statement can properly be perceived as an indirect request from the Court below that this Court grant review and provide proper guidance to the Board and the courts below in this very vital area.

2. Section 8(g) of the Act

The second critical issue raised by this petition is whether there must be compliance with Section 8(g)'s 10-day notice requirement before a group of union-represented employees

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[5] Clearly, such deference is improper where the administrative interpretation is contrary to the express provisions of the statute. As this Court stated in *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965), "[r]eviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

[6] See also Judge Coffey's dissent below (30a-37a) in which he forcefully argues that such a *per se* rule is in harmony with, if not required by, the statutory scheme, as well as this Court's *Emporium Capwell* decision and its progeny.

may engage in a strike. Contrary to Respondent's assertions (Opp. 9), that issue has not been considered by any other Court of Appeals. Indeed, all of the cases cited by Respondent, and by the Court below, involved concerted activity by employees who had no union representative.[7] Clearly, those cases where employees had no union which could have given the requisite notice are distinguishable from the present case where employees had a duly-certified union representative which, if properly advised, could have given the required notice. Because the Board neither explained or even recognized that very important distinction, its decision is not entitled to the deference accorded to it by the Court below. In short, contrary to Respondent's argument, "the concern that led Congress to enact Section 8(g)—disruptions in patient care resulting from unanticipated strike activity—" (Opp. 10) was not adequately addressed by the Board's interpretation.

The decision below creates a very large gap in the Congressional intent to prohibit sudden unannounced disruptions of service at health care institutions, one which, if allowed to stand, may very well render Section 8(g) completely nugatory. The importance and urgency of resolving this very significant issue can only be stated with the utmost emphasis. Thus, because the decision below presents a question of critical importance in the national labor policy as applied at all health care institutions, it is an issue which should be heard and resolved by this Court.

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[7] *NLRB* v. *Long Beach Youth Center, Inc.*, 591 F. 2d 1276 (9th Cir. 1979) is the only case cited by Respondent where a union had been attempted to organize striking employees. However, the union in *NLRB* v. *Long Beach Youth Center, Inc., supra,* unlike the union in the instant case, had not attained Section 9(a) majority status, having been neither certified nor recognized under that provision of the Act.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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